Supreme Court, U.S.
FILED

01 1224 FEB 6 2002

OFFICE OF THE CLERK

No.

In the

**Supreme Court of the United States**

---

TRUCKEE-CARSON IRRIGATION DISTRICT;

*Petitioner,*

vs.

UNITED STATES OF AMERICA AND
PYRAMID LAKE PAIUTE TRIBE OF INDIANS,

*Respondents.*

---

On Petition for Writ of Certiorari
To The United States Court of Appeals
For the Ninth Circuit

---

# PETITION FOR WRIT OF CERTIORARI

---

Michael J. Van Zandt*
Craig A. Pridgen
Elizabeth P. Ewens
McQUAID, METZLER, BEDFORD
& VAN ZANDT, LLP
*Attorneys for Petitioners*
221 Main Street, 16th Floor
San Francisco, CA 94105
Telephone: 415/905-0200
* *Counsel of Record*

## QUESTIONS PRESENTED FOR REVIEW

A. Does the Ninth Circuit's decision effectively depart from and thus conflict with this Court's decision in *Nevada v. United States*, 463 U.S. 110 (1983)? Specifically, the Ninth Circuit's failure to recognize the United States' initiation of water rights in 1902 for purposes of applying Nevada's forfeiture statute effectively undermined the water rights adjudication embodied in the Orr Ditch Decree (D.Nev. 1944), the finality and enforceability of which was upheld by this Court in *Nevada v. United States*, supra.

B. Does the Ninth Circuit's failure to adhere to Nevada Supreme Court precedent and Nevada's statutory provisions regarding water rights impinge upon the sovereignty of that State and violate the express provisions of the Reclamation Act of 1902 which provide that state law controls within federal reclamation projects?

C. Did the Ninth Circuit err by requiring an investment by a successor-in-interest when it applied the investment backed expectations doctrine to the facts of this case, thereby eradicating established Nevada state water law regarding initiation of a water right and the relation back doctrine?

D. Does the Ninth Circuit Ruling effectively redefine fundamental principles of water law in the Western United States promulgated by a century of State and Federal decisions recognizing state law in the context of the implementation of the Reclamation Act of 1902?

## PARTIES TO THE PROCEEDING

Parties to the proceedings in the Ninth Circuit Court of Appeals include the United States of America, Pyramid Lake Paiute Tribe of Indians, the Town of Fernley, the Nevada State Engineer, and the Truckee-Carson Irrigation District. The Orr Water Ditch Company and other water right owners are named parties to the underlying litigation, but are not parties to the present action for the enforcement of the Orr Ditch Decree.

## TABLE OF CONTENTS


Page

QUESTIONS PRESENTED FOR REVIEW. . . . . i

PARTIES TO THE PROCEEDINGS. . . . . ii

TABLE OF CONTENTS. . . . . iii

TABLE OF AUTHORITIES. . . . . v

OPINIONS BELOW. . . . . 1

JURISDICTION. . . . . 1

STATUTORY PROVISIONS. . . . . 2

STATEMENT OF THE CASE. . . . . 3

ARGUMENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI. . . . . 7

I. THE NINTH CIRCUIT'S FAILURE TO RECOGNIZE THE UNITED STATES' INITIATION OF WATER RIGHTS IN 1902 FOR PURPOSES OF DETERMINING THE APPLICABILITY OF NEVADA'S FORFEITURE STATUTE EFFECTIVELY INVALIDATES THE ORR DITCH DECREE AND

REVERSES THIS COURT'S HOLDING IN *NEVADA V. UNITED STATES*.. . . . . 7

II. THE NINTH CIRCUIT'S FAILURE TO ADHERE TO NEVADA SUPREME COURT PRECEDENT AND NEVADA'S STATUTORY PROVISIONS REGARDING THE INITIATION OF WATER RIGHTS IMPINGES UPON THE SOVEREIGNTY OF THAT STATE AND VIOLATES THE EXPRESS PROVISIONS OF THE RECLAMATION ACT OF 1902.. . . . . 11

A. The Reclamation Act of 1902 is clear: state law controls on issues relating to the appropriation, use, and distribution of water within federal reclamation projects. . . . . 11

B. There is no state law support for the Ninth Circuit's position that a second "initiation" of a water right before March 22, 1913 is required for project water users to avoid application of Nevada's forfeiture statute.. 12

C. The Ninth Circuit incorrectly interposed its opinion of the way water rights should be determined and administered in the state of Nevada when it decided this case.. . . . . 15

CONCLUSION. . . . . 21

APPENDIX (Filed herewith)

## TABLE OF AUTHORITIES

**Cases**

*California v. United States*, 438 U.S. 645, 654 (1978). . . . . 12

*In re Manse Spring*, 108 P.2d 311, 315-316 (Nev. 1940). . . . . 13, 15

*Nevada v. United States*, 463 U.S. 110 (1983). . . . . 3, 4, 6, 7, 9, 10, 14, 21

*Ophir Silver Mining Co. v. Carpenter*, 4 Nev. 534, 543-544 (1869) .14

*Palazzolo v. Rhode Island*, 533 U.S. 606 (2001). . . . . 21

*United States v. Orr Water Ditch Company*, 256 F.3d 925 (9th Cir. 2000) . . . . . 1, 10, 15, 18, 19, 20

*United States v. Alpine Land & Reservoir Co.*, 508 F. Supp. 877 (D. Nev. 1980) . . . . . 16

*United States v. Alpine Land & Reservoir Co.*, 983 F.2d 1487 (9th Cir. 1993) . . . . . 17, 18

*United States v. Alpine Land & Reservoir Co.*, 27 F.Supp.2d 1230 (1998) . . . . . 18

**Statutes**

Reclamation Act of 1902, 43 U.S.C. § 383 . . . . . 2, 12

28 U.S.C. Sec. 1291 (1994). . . . . 1

Statutes

28 U.S.C. Sec. 1254(1). . . . . 2
Nevada Revised Statute § 533.060 . . . . . 4, 20
Nevada Revised Statute § 533.085 . . . . . 2, 6, 13, 15, 18
Nevada Revised Statute § 533.324 . . . . . 13, 14
Nevada Revised Statute § 533.335 . . . . . 19

## OPINIONS BELOW

This case originated in the Office of the State Engineer of the State of Nevada with the Ruling *In the Matter of Protested Application 56226, Filed to Change the Manner and Place of Use for the Waters of the Truckee River Heretofore Decreed in the Orr Ditch Decree, Stroey County, Nevada*, Ruling #4116 (hereinafter the "State Engineer's Ruling #4116"). The State Engineer's Ruling #4116 is reproduced in the Appendix hereto at C-1. The United States and the Pyramid Lake Paiute Tribe of Indians (hereinafter "PLIT") appealed the State Engineer's Ruling #4116 to the United States District Court, District of Nevada. The opinion of the District Court is found in the Appendix at B-1. That decision, in turn, was appealed to the Ninth Circuit Court of Appeals also by the United States of America and PLIT. The original opinion of the Ninth Circuit Court of Appeals is reported as *United States v. Orr Water Ditch Company*, 256 F.3d 925 (9th Cir. 2000) (Justice Noonan dissenting) and is reproduced herein the Appendix at A-1. The Order of the Ninth Circuit Court of Appeals denying the Petition for Panel Rehearing and Rehearing *En Banc* also is reproduced in the Appendix at D-1.

## JURISDICTION

The District Court reviewed State Engineer's Ruling #4116 pursuant to its continuing jurisdiction over the Orr Ditch Litigation. *See United States of America v. Orr Water Ditch Co., et al..*, In Equity Docket No. A-3 (D. Nev. 1944). On July 5, 2001, the Ninth Circuit Court of Appeals reversed the decision of the United States District Court for the District of Nevada. Jurisdiction in the Court of Appeals was based on 28 U.S.C. Sec. 1291 (1994). On November 8, 2001, the Court of Appeals denied the timely Petition for Panel

Rehearing and Rehearing *En Banc* filed by the Truckee-Carson Irrigation District (hereinafter "TCID"). Pursuant to Supreme Court Rule 13, this Petition for Writ of Certiorari is filed within ninety (90) days of that Order. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

## STATUTORY PROVISIONS

The statutes at issue include Section 8 of Reclamation Act of 1902, 43 U.S.C. § 383, which states as follows:

> Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof.

The above also is reproduced in the Appendix at E-1. Also at issue is Nevada Revised Statutes ("NRS") § 533.085, found in the Appendix at G-1, which states, in pertinent part:

> Nothing contained in this chapter [including provisions regarding the forfeiture of water rights] shall impair the vested right of any person to the use

> of water, nor shall the right of any person to take and use water be impaired or affected by any of the provisions of this chapter where appropriations have been initiated in accordance with law prior to March 22, 1913.

Additional statutory authority relevant to this Petition is reproduced in the Appendix at F-1, H-1 and I-1.

## STATEMENT OF THE CASE

The history of this litigation dates back to 1913 with the initiation of a lawsuit by the United States to quiet title to all water rights to the Truckee River for the benefit of the Pyramid Lake Indian Reservation ("PLIT") and the Newlands Reclamation Project, both located in western Nevada. That litigation, termed the Orr Ditch Litigation, was resolved by way of settlement and the District Court's approval of that settlement agreement in 1944, as set forth in the Orr Ditch Decree. *See* Appendix at J-1. Years later, the United States attempted, unsuccessfully, to obtain additional rights to the waters of the Truckee River for the benefit of PLIT. This Court, in *Nevada v. United States,* held that the United States could not relitigate the water rights and affirmed the finality of Orr Ditch Decree. *See Nevada v. United States,* 463 U.S. at 143-144.

In 1991, the Town of Fernley filed an application with the Nevada State Engineer to change the manner and place of use of approximately 280 acre-feet of water, which represents a portion of the waters decreed under Claim No. 3 of the Orr Ditch Decree, water within the Truckee Division of the Newlands Reclamation Project. Both the United States and PLIT protested the application and asserted that the water rights at issue had been forfeited under

Nevada state law. *See* NRS § 533.060 (1979), Appendix at F-1. The motivation for their protest was the same in this litigation as in the litigation leading to this Court's opinion in *Nevada v. United States*, namely, to secure additional water rights for the benefit of PLIT and, specifically, to increase the flow to Pyramid Lake.[1] *See Nevada v. United States*, 463 U.S. at 118-120. Following a hearing on this matter, the State Engineer issued Ruling #4116 rejecting the United States and PLIT's forfeiture argument and approving the Town of Fernley's transfer application. The State Engineer correctly held that the water rights at issue were initiated in accordance with state law prior to the enactment of Nevada's forfeiture law on March 22, 1913. Specifically, the State Engineer held that the water rights at issue were initiated in 1902 by the United States under Nevada law and, although not perfected until after the enactment of the forfeiture statute, under the well recognized doctrine of relation back, and consistent with state law, the water rights at issue relate back to the earlier date when the water right was first initiated and, accordingly, the water rights were not subject to forfeiture under Nevada law.

The United States and PLIT appealed to the United States District Court for the District of Nevada. Like the State Engineer, the District Court held, consistent with the Orr Ditch Decree, that the first act of appropriation and the priority date for all individual Project water rights is July 2, 1902. This date represents the date

---

[1] In the present case, the United States and PLIT's propositions regarding the interpretation of the State of Nevada's forfeiture law, as adopted by the Ninth Circuit, threatens to extinguish, through misapplication of Nevada's forfeiture laws, literally hundreds of valid water rights within the Project. The net effect would be additional water available to benefit PLIT and Pyramid Lake.

that the water rights were first initiated and is the established priority date for all of the water rights at issue. The District Court's reasoning was based on established Nevada water law and the practical realities associated with the administration of water rights. Using an analogy to a line of water users organized by their respective priority dates, the District Court recognized the importance of enforcing the priority date, the date that the water rights were first initiated by the United States, as mandated by the Orr Ditch Decree. The District Court wrote as follows:

> The benefits of creating such a line are obvious. First, those persons standing in line will be limited to only those users who have already obtained, or who are in the process of obtaining, a right to take water ... Second, the water users placed at the front of the line would be secure in the knowledge that they would get water from the river in even the driest of years. In contrast, although users placed at the back of the line would have less assurance of receiving water in dry years, these lower priority users could plan accordingly ... Third, and as a result of the above, each water right gains a relative value according to a user's place in line. For example, persons that did not have a place in line, but who wanted to purchase a spot in line, would know that a water right at the front of the line would be more valuable than a water right at the back of the line. Similarly, those at the front of the line would know that their rights would be sought after by persons wanting to obtain water rights.

*See* Appendix at p. B-7 - B-9. Generations of water users, based on the Orr Ditch Decree and this Court's opinion in *Nevada v. United States*, felt secure in their positions at the "front of the line" with a common priority date of July 2, 1902, and bought, sold, and planned for the use of their water in reliance thereon.

On appeal, the Ninth Circuit (Judge W. Fletcher, for the majority) reversed the District Court and in so doing effectively destroyed all that previously was thought to be true. Somewhat ironically, the Ninth Circuit agreed with the lower courts that the priority date for all of the rights at issue in this case is 1902. However, it ignored Nevada law that, by definition, the priority date is the date of the initiation of the water right. Under Nevada law, a water right commences not from the date that it is perfected by the ultimate user, but relates back to the date the first step was taken to initiate the water right: the priority date. Instead of following this well established tenet of Nevada water law, the Ninth Circuit concluded that the 1902 priority date was not enough to exempt the water rights from application of the forfeiture statute. Notwithstanding the express language of NRS § 533.085 that nothing in the forfeiture statute shall impair or affect a person's right to take and use water where appropriations had been initiated prior to March 22, 1913, the Ninth Circuit held that the water user, or his or her predecessors in interest, must have "re-initiated" the water right by personally taking affirmative steps to appropriate water for his or her own use on his or her particular parcel of land by March 22, 1913 in order to avoid application of the forfeiture statute despite the fact that the United States had already initiated the same water right in 1902. The effect of this holding is twofold. First, it undermines the continued validity of the Orr Ditch Decree and this Court's holding in *Nevada v. United States*. Second, it creates two sets of water rights under Nevada law: those within the

Reclamation Project now subject to new rules fashioned by the federal court of appeals regarding priority date and the initiation of water rights, and all other water rights in Nevada.

## ARGUMENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

### I. THE NINTH CIRCUIT'S FAILURE TO RECOGNIZE THE UNITED STATES' INITIATION OF WATER RIGHTS IN 1902 FOR PURPOSES OF DETERMINING THE APPLICABILITY OF NEVADA'S FORFEITURE STATUTE EFFECTIVELY INVALIDATES THE ORR DITCH DECREE AND REVERSES THIS COURT'S HOLDING IN *NEVADA V. UNITED STATES.*

The Orr Ditch Decree and *Nevada v. United States* adjudicated with finality the Truckee River water rights used within the Newlands Project. From those orders, we know several things. First, the initial appropriation of the water of the Truckee River under the Reclamation Act of 1902 was initiated by the United States on July 2, 1902. Second, after the United States initiated the water rights, it acted with due diligence to construct an elaborate canal and irrigation system through which the water eventually would be put to beneficial use. Third, the priority date for the subject water rights relates back to the day the United States first initiated the appropriation of water, July 2, 1902. Finally, all of the above benefits and is binding upon the United States and each and every one of its successors and assigns, including TCID and the water users within the Newlands Reclamation Project. *See Orr Ditch Decree*, Appendix at p. J-1;[2] *Nevada v. United States*, 463 U.S. 110,

---

[2]The applicable portion of the Orr Ditch Decree provide as follows:

143-145 (1983).

There was only one initial appropriation of the water from the Truckee River: that by the United States when it initiated the appropriation of the water from the Truckee River by withdrawing the subject lands and began construction of the irrigation project on July 2, 1902. *See* Orr Ditch Decree, Appendix at p. J-6 - J-7. The water rights, first initiated by the United States, were thereafter acquired by contract and transferred to the ultimate irrigators with a priority date of July 2, 1902. As discussed more fully, below, once the irrigators acquired the contractual right to receive water and

---

> [T]he parties, persons, corporations, intervenors, grantees, successors in interest and assigns and substituted parties above and hereinafter named and their successors in interest and assigns are, and each of them is, as against every other one, hereby adjudged to be the owners of the water rights hereinafter specified and set forth ... according to the respective dates of appropriation and priorities as hereinafter stated, found and allowed ... *Claim No. 3* ... Under the Reclamation Act of June 17, 1902, the United States, acting by the Secretary of the interior, on July 2, 1902, withdrew from public entry ... the lands required for the Government's first reclamation project, now known as the Newlands Project. Thereupon and with due diligence the United States proceeded with the construction of the Derby Dam across the Truckee River. ... Subject to prior appropriations and vested rights permitted and confirmed by the Act of Congress of July 26, 1866, the plaintiff (United States) is entitled and allowed to divert, with a priority of July 2, 1902, through the Truckee Canal 1,500 cubic feet of water per second flowing in the Truckee River for the irrigation of 232,800 acres of lands on the Newlands Project ...
>
> Orr Ditch Decree, Appendix at p. J-3 - J-7.

placed that water to a beneficial use, the water rights were perfected, but with a priority date based upon the date of the first act of appropriation by the United States on July 2, 1902. It is this date that must be upheld.

The importance of upholding the Orr Ditch Decree, and the priority dates decreed thereunder, cannot be underestimated. The entire system for the administration of water rights is dependent upon the conclusiveness and finality of water right decrees, and the entire system breaks down if those decrees are not enforced. The Court in *Nevada v. United States* explained as follows:

> The policies advanced by the doctrine of res judicata perhaps are at their zenith in cases concerning real property, land and water. As this Court explained over a century ago ... "Where questions arise which affect titles to land it is of great importance to the public that when they are once decided they should no longer be considered open. Such decisions become rules of property, and many titles may by injuriously affected by their change ... [Where] courts vacillate and overrule their own decisions ... affecting the title to real property, their decisions are retrospective and may affect titles purchased on the faith of their stability. Doubtful questions on subjects of this nature, when once decided, should be considered no longer doubtful or subject to change." A quiet title action for the adjudication of water rights, such as the *Orr Ditch* suit, is distinctively equipped to serve these policies ...

*Nevada v. United States*, 463 U.S. at 129 (*internal citations omitted*). Because the Orr Ditch Litigation was a comprehensive adjudication

of the water rights at issue, its findings are binding upon not only parties to the Orr Ditch Litigation, including the United States, but also on all subsequent water users. *See Nevada v. United States*, 463 U.S. at 143-145.

The fact that the Ninth Circuit's ruling has the effect of reversing both the Orr Ditch Decree and *Nevada v. United States* was not lost on Justice Noonan of the Ninth Circuit. In his reasoned dissent, he wrote:

> In 1902, the United States initiated the appropriation of the water rights here in dispute by the enactment of the Reclamation Act. *See Nevada v. United States*, 463 U.S. 110, 115-117, 77 L. Ed. 2d 509, 103 S. Ct. 2906 (1983). In so doing, the United States acted as trustee on behalf of the later individual owners of land within the Reclamation Project. *Id.* at 126. These water rights were consequently not subject to forfeiture and can now be transferred as the State Engineer and the district court ruled. In reaching the result it does, the majority silently but effectively departs from what the Supreme Court of the United States has already determined.

*United States v. Orr Water Ditch Company*, 256 F.3d 935, 948 (9th Cir.. 2001).[3]

Granting certiorari to address these issues is appropriate not only because of the implications within the Newlands Reclamation Project in Nevada and because it undermines a decision of this

---

[3] The Ninth Circuit's opinion is included in the Appendix at p. A-1.

Court, but also because of the negative precedent it sets regarding the finality of water right decrees established within federal reclamation projects across the nation. In issuing its decision, the Ninth Circuit effectively ignored the decisions of both federal and state courts that came before it, a dangerous precedent indeed.

## II. THE NINTH CIRCUIT'S FAILURE TO ADHERE TO NEVADA SUPREME COURT PRECEDENT AND NEVADA'S STATUTORY PROVISIONS REGARDING THE INITIATION OF WATER RIGHTS IMPINGES UPON THE SOVEREIGNTY OF THAT STATE AND VIOLATES THE EXPRESS PROVISIONS OF THE RECLAMATION ACT OF 1902.

### A. The Reclamation Act of 1902 is clear: state law controls on issues relating to the appropriation, use, and distribution of water within federal reclamation projects.

In drafting the Reclamation Act of 1902, it was the express intent of the United States Congress that water rights developed as a result of the reclamation projects be determined and administered in a manner consistent with state law. The applicable portion of the Reclamation Act of 1902 provides as follows:

> Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity

> with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof.

43 U.S.C. § 383. As recognized by this Court, "the history of the relationship between the Federal Government and the States in the reclamation of the arid lands of the Western States is both long and involved, but through it runs the consistent thread of purposeful and continued deference to state water law by Congress." *California v. United States*, 438 U.S. 645, 654 (1978). Congress chose this course for good reason. Given the differences between the states in climate, topography, history, and other matters affecting the availability and distribution of water, each state is in the best position to formulate laws relating to the use of water within its borders, and is the most appropriate judge of the interpretation and enforcement of its laws. *Id.* at p. 667 ("'The conditions in each and every State and Territory are different. What would be applicable in one locality is totally and absolutely inapplicable in another ....In each and every one of the States and Territories affected, after a long series of experiments, after a due consideration of conditions, there has arisen a set of men who are especially qualified to deal with local conditions.'") (*internal citation omitted*).

B. <u>There is no state law support for the Ninth Circuit's position that a second "initiation" of a water right before March 22, 1913 is required for project water users to avoid application of Nevada's forfeiture statute</u>.

In Nevada, there are pre-statutory water rights initiated before March 22, 1913, and statutory water rights arising under codified state law after March 22, 1913. When Nevada enacted the applicable statutes, it was its stated intent that the statutes, including the forfeiture statute, would not work to deprive water users of their pre-statutory water rights. The applicable Nevada code section states:

> Nothing contained in this chapter shall impair the vested right of any person to the use of water, nor shall the right of any person to take and use water be impaired or affected by any of the provisions of this chapter where appropriations have been initiated in accordance with law prior to March 22, 1913.

NRS § 533.085; *see also In re Manse Spring*, 108 P.2d 311, 315-316 (Nev. 1940) ["It is apparent that the legislature at the time of its enactment of the 1913 statute was careful to refrain from infringing upon rights which had accrued at that time, so as to avoid any question of the constitutionality of the act, and as a precautionary measure wrote into the statute (NRS § 533.085)."] This code section protects two classes of water rights: those that were vested prior to March 22, 1913 *and* those that were initiated prior to March 22, 1913. Vested water rights, involving water actually put to beneficial use prior to March 22, 1913, are protected under the statute. Also protected are those water rights that were initiated prior to March 22, 1913 but that were not actually applied to the land or put to beneficial use until some time after that date. *See e.g.* NRS § 533.324 (defining "water already appropriated" to include water rights that had already been initiated but had not yet been

applied to the intended use)[4].

Under established Nevada water law, a water right is "initiated" when the first steps are taken to appropriate the water. Once those first steps are taken, so long as the appropriator proceeds with due diligence to move the process forward toward actual application to beneficial use, then when the water is placed to beneficial use, its priority date relates back to the date when the first step was taken to appropriate the water. *See Ophir Silver Mining Co. v. Carpenter*, 4 Nev. 534, 543-544 (1869) ("When any work is necessary to be done to complete the appropriation, the law gives the claimant a reasonable time within which to do it, and although appropriation is not deemed complete until the actual diversion or use of water, still if such work be prosecuted with reasonable diligence, the right relates to the time when the first step was taken to secure it.") In the present case, the work was begun by the United States and, but for the United States' efforts in constructing the dams and canals, the individual farmers could not apply water from the Truckee River to their lands. Accordingly, the water right is recognized *as of the date that it was initiated* by the United States as opposed to the date when it vested.

In the present case, a prior court already held that the United States initiated the water rights at issue on July 2, 1902, that once initiated the United States proceeded with due diligence toward the goal of putting the water to beneficial use, and, consistent with the above, that the priority date of the water rights eventually perfected is July 2, 1902. *See* Orr Ditch Decree; *see also Nevada v. United*

---

[4] When the state legislature adopted this statute, the legislature intended it to codify the existing definition of "water already appropriated", not to change it. Accordingly, the statute was given both retroactive and prospective application. *See* NRS 533.324 (*annotated)* (attached hereto in the Appendix at p. H-1).

*States, supra.* For this reason, the Ninth Circuit erred when it failed to recognize July 2, 1902 as the date of the initiation of the water rights.

C. The Ninth Circuit incorrectly interposed its opinion of the way water rights should be determined and administered in the state of Nevada when it decided this case.

The Ninth Circuit erroneously determined that "in order for a given water right to receive the protection of Nev. Rev. Stat. § 533.085, the water right must have vested, or an individual landowner must have 'initiated' appropriation of that right, before March 22, 1913." *United States v. Orr Water Ditch Company*, 256 F.3d at 943 (*internal citations omitted).* In other words, rather than recognizing the efforts of the United States initiated in July 1902 to build the dams and irrigation canals that would enable the water to be carried to the farmlands to be put to beneficial use, the Ninth Circuit would only recognize affirmative steps taken by subsequent landowners to appropriate water on his or her particular parcel of land. *Id.* at p. 942-944.

The Ninth Circuit's analysis is flawed for several reasons. First, it is contrary to the law of Nevada which holds that when an individual acquires rights, he stands in the shoes of his predecessor in interest. The change in ownership does not break the chain, it does not require the subsequent owner to begin the process of appropriation anew. *See In re Manse Spring*, 108 P.2d 311, 316 (Nev. 1940). Second, it ignores the very basic fact that the individuals at issue purchased water that had already been appropriated. They entered into contracts with the United States to purchase water that already had been appropriated. The individuals

did not set out to initiate new appropriations, they merely finished what their predecessor in interest, the United States, first began in 1902: the initiation of water rights within the Newlands Reclamation Project and the construction of the supporting works at a cost of $6,250,000.00.[5] Moreover, once they purchased these rights, the water users applied the water to the same land originally withdrawn by the United States. Third, individual water users, like the United States, should not be subjected to different standards based upon the date of the enactment of the 1913 statutes in relation to the date of water contracts. *See United States v. Alpine Land & Reservoir Co.*, 508 F. Supp. 877 (D. Nev. 1980). At issue in that case were a number of contracts entered into by the United States through which the United States acquired water rights. Some of the contracts were entered into prior to 1913, and some after 1913 when Nevada's statutory scheme for the administration of water rights was in place. Nothing in the common law of the state

---

[5] This conclusion is supported by the language of the Orr Ditch Decree which defines both the purpose and the place of use for the waters being appropriated. It states, in pertinent part: "Under the Reclamation Act of June 17, 1902, the United States, acting by the Secretary of the Interior, on July 2, 1902, withdrew from public entry, excepting under the homestead laws in accordance with the provisions of the Act, the lands required for the Government's first reclamation project ... Thereupon and with due diligence the United States proceeded with the construction of the Derby Dam across the Truckee River ... and with the construction of the Truckee Canal with a carrying capacity of 1,500 cubic feet of water per second, running from this dam a distance of 31 miles to the Lahontan Reservoir on the Carson River, and with the construction of the Lahontan Reservoir, with a storage capacity of 290,000 acre feet, and with the construction of about 250 miles of lateral and sub-lateral irrigation canals sufficient for carrying water for the irrigation of 151,000 acres." *See* Orr Ditch Decree, Appendix at p. J-6 - J-7.

of Nevada prior to 1913 required the United States or any other party to file applications for changes in the place of diversion or place of use for water rights. Notwithstanding this, the defendants in that action argued that in failing to make change applications as required by the 1913 statute, the United States forfeited its claimed rights. The Court disagreed and held that the United States was entitled to carry out and complete the Project under the Nevada law as it existed when the Project plan was commenced in 1902. Specifically, the Court held that the intervening enactment of Nevada's water code could not be used to destroy the rights acquired by the United States and, further, that "for the Newlands Project the applicable Nevada law was the state water law as it existed in 1902." *Id.* at 884-885. In sum, because the water rights at issue in the present case were purchased from the United States, the present water users stand in the shoes of the United States and get what the United States had: rights based upon Nevada law as it existed in 1902. *Id.* Finally, the Ninth Circuit's analysis is flawed because it fails to recognize that the individual water users could not, based on the location of the lands in relation to the Truckee River, appropriate water from the Truckee River but for the acts of the United States in constructing the dams and canals that would make irrigation of the lands possible. For all of the above reasons, in failing to recognize 1902 as the date of the initiation of the water rights, the Ninth Circuit acted contrary to the facts of this case and contrary to Nevada law.

In support of its opinion, the Ninth Circuit relied on its holding in a separate case, *United States v. Alpine Land & Reservoir Co.*, 983 F.2d 1487 (9th Cir. 1993) ("*Alpine III*") (*see* Appendix at K-1) and on a new theory based on the "investment backed expectations" of the individual water users. However, neither the Ninth Circuit's prior decision in *Alpine III*, nor the investment backed

expectations theory justify a departure from established Nevada water law.

The Ninth Circuit's decision in *Alpine III* is inapplicable to the instant action. In that case, the issue before the Ninth Circuit was whether water rights *vested* in 1902 for purposes of determining the applicability of Nevada's forfeiture statute. In the present case, the issue is whether the water rights at issue were *initiated* in 1902. As Justice Noonan wrote in his dissent:

> [The majority] misinterprets Alpine III. That case was about vesting; this court reversed the State Engineers's (sic) erroneous determination that water rights had vested in 1902. *Alpine III*, 965 F.2d 731, 738 (9th Cir. 1992). When it was brought to the court's attention that the court had said nothing about the initiation of appropriation of rights (an issue not before it) the court amended its disposition to remand the question of initiation. *Alpine III*, as amended, 983 F.2d 1487, 1496 (9th Cir. 1993).

*United States v. Orr Water Ditch Company*, 256 F.3d at 949. Stated another way, *Alpine III* addressed the first prong of NRS § 533.085 (regarding the effect of the forfeiture statute on rights which vested before 1913), whereas the present case involves the second prong of that statute (regarding the effect of the forfeiture statute on water rights initiated in accordance with law prior to March 22, 1913). In his opinion, in *United States v. Alpine Land & Reservoir Co.*, 27 F.Supp.2d 1230 (1998) (*see* Appendix at L-1), District Court Judge McKibben, while following the holdings of *Alpine III*, agreed that the 1902 priority date should be controlling on the issue of forfeiture. Appendix, p. L-16.

The Ninth Circuit also based its opinion on an analysis regarding the "investment backed expectations" of the individual water users. *See United States v. Orr Water Ditch Company*, 256 F.3d at 942-943. Judge W. Fletcher opined that there is "no reason to protect individuals who began the process of acquiring water rights after the effective date of the statute, because they did so with notice that any water rights they acquired would be subject to forfeiture." *Id.* To the contrary, as successors in interest to the United States, and pursuant to Nevada law, those individuals would have every reason to believe that the water rights they purchased carried with them the same priorities, rights and title as held by any other individual or entity who preceded them. This conclusion is supported by the fact that, after passage of the State statutes, any person who wanted to initiate a new water right had to file an application for a permit to appropriate water with the Nevada State Engineer and in this case none of the water rights at issue were initiated by such an application because they were already initiated by the United States under the Nevada law in place in 1902 as required by Section 8 of the Reclamation Act of 1902. *See* NRS § 533.335 (Application for permit to appropriate water); *see also* State Engineer's Ruling #4116 at p. 9.[6] Further, the Ninth Circuit's

---

[6] The State Engineer found the following:

> Beginning in 1905, any person who wanted to initiate a water right in Nevada was required to obtain a permit from the Nevada State Engineer. The water rights that are the subject of Application 56226 were not initiated by an application to the Nevada State Engineer. Instead, all of the water rights requested to be changed under Application 56226 were initiated in accordance with the Reclamation Act, as evidenced by the documents submitted to

investment backed expectations analysis ignores the fact that everyone entered into nearly identical contracts when they purchased water from the United States. If the Ninth Circuit is correct regarding its investment backed expectations analysis, then individuals who signed their contracts before 1913 would have different legal rights regarding what they acquired compared to those who signed after 1913 notwithstanding the fact that their contracts are nearly identical. Under the Ninth Circuit's analysis, pre-1913 contracts would not be subject to Nevada's statutory forfeiture laws, only to laws involving common law abandonment. On the other hand, rights purchased by way of post-1913 contracts would be subject to potential loss under either the forfeiture statute or through proof of common law abandonment. Because it is much easier to prove forfeiture as opposed to abandonment under Nevada law, rights purchased prior to 1913 would be much more valuable than those purchased after that date. *See* NRS § 533.060, Appendix at F-1, *see also: United States v. Orr Water Ditch Company*, 256 F.3d 935, 941 (9th Cir. 2001) ("In most cases, it is easier to establish forfeiture than abandonment because forfeiture requires only a showing of non-use for five successive years. Abandonment, on the other hand, is the 'relinquishment of the right by the owner with the intention to forsake and desert it.'") (*internal citations omitted)*. The end result would be absurd: the same contract would have a

---

> the United States Department of the Interior by the original water right holder. Therefore, the State Engineer finds that the appropriation of the water rights requested to be changed under Application 56226 was initiated in accordance with the law in effect prior to March 22, 1913.

*See* State Engineer's Ruling #4116, p. 9 (Appendix at p. C-10 - C-11).

different value based only on the date that it was signed. The Ninth Circuit's investment backed expectations analysis also is flawed because if you apply the 1913 statutes to rights initiated prior to that date just because title passed from one to another after the passage of the 1913 statutes, it raises constitutional concerns relating to the retroactive application of that statute and runs contrary to this Court's holding in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

Pursuant to the express terms of the Reclamation Act of 1902 and case law interpreting that statute, issues relating to the control, appropriation, use, or distribution of water are issues of state law. Federal courts are bound to follow the laws of the individual states in deciding these issues. Accordingly, the Ninth Circuit erred when it substituted its judgment for that of the state of Nevada. This Petition for Writ of Certiorari should be granted to correct this error and to protect states' sovereign right to administer water rights within their borders.

## CONCLUSION

Granting a petition for writ of certiorari is appropriate when the Court of Appeals has entered a decision that conflicts with decisions of this Supreme Court or when it has decided an issue that conflicts with a decision by a state court of last resort. In the present case, the Ninth Circuit did both. Its ruling effectively overrules this Court's opinion in *Nevada v. United States*, it undermines established law that a State's law controls water law issues that arise within its borders, and it is in direct conflict with Nevada Supreme Court cases on the law of prior appropriation. Because the decision will impact the administration of water rights not only within the Newlands Reclamation Project, but in federal reclamation projects across the nation, and because it represents

such a radical departure from the case law developed both by this Court and the Nevada Supreme Court, granting this Petition for Writ of Certiorari is appropriate. Accordingly, Petitioner, TCID, respectfully submits this Petition for Writ of Certiorari and requests that this Court grant the same.

Dated: San Francisco, California
February 6, 2002

Michael J. Van Zandt*
Craig A. Pridgen
Elizabeth P. Ewens
McQUAID, METZLER,
BEDFORD & VAN ZANDT, LLP
*Attorneys for Petitioners*
221 Main Street, 16th Floor
San Francisco, CA 94105
Telephone: 415/905-0200
* *Counsel of Record*